

<p>This Opinion is not a Precedent of the TTAB</p>
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Mailed: August 27, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aaron Mason

Serial No. 88773278

Francis John Ciaramella of Francis John Ciaramella, PLLC
for Aaron Mason.

Steven M. Perez, Trademark Examining Attorney, Law Office 101,
Zachary R. Sparer, Managing Attorney.

Before Cataldo, Bergsman, and Lebow,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Aaron Mason, seeks registration on the Principal Register of the mark EFF APPAREL (in standard characters with “APPAREL” disclaimed), identifying the following goods: “hats; hoodies; sweatshirts; T-shirts; short-sleeved or long-sleeved T-shirts” in International Class 25.¹

¹ Application Serial No. 88773278 was filed on January 25, 2019, based on Applicant’s assertion of December 1, 2019 as a date of first use of the mark anywhere and January 1, 2020 as a date of first use in commerce under Section 1(a) of the Trademark Act. 15 U.S.C. § 1051(a).

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of



likelihood of confusion with the registered mark identifying the following goods: "athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms," in International Class 25.²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Likelihood of Confusion

We base our determination of likelihood of confusion under Trademark Act Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); see also *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

Page references to the application record are to the downloadable .pdf version of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board's TTABVUE docket system.

² Registration No. 5391150 issued on the Principal Register on January 30, 2018 with the following description of the mark and color statement: "The mark consists of the letters 'E F F' above a stylized drawing of a baseball all within the outline of a drawing of a baseball home plate." "Color is not claimed as a feature of the mark."

We have considered each *DuPont* factor that is relevant, and have treated other factors as neutral. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“the various evidentiary factors may play more or less weighty roles in any particular determination”). Two key considerations are the similarities between the marks and the relatedness of the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (the “fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018).

A. The Goods, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *see also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

It is long settled that likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and registration at issue. *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976); *see also Octocom Systems*, 16 USPQ2d at 1787 (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed”).

In this case, Applicant’s “hats” are identical to registrant’s “athletic apparel, namely ... hats,” and Applicant’s “T-shirts; short-sleeved or long-sleeved T-shirts” are presumed to be included among the “athletic apparel, namely, shirts” identified in the cited registration. Based on the plain wording of the respective identifications, Applicant’s above-noted goods are, in part, either literally identical to counterpart goods identified in the cited registration, or legally identical to goods identified in the cited registration because they are encompassed within them. *See In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018); *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). Applicant presents no arguments regarding the relatedness of the goods.

Furthermore, because the goods discussed above in the application and cited registration are in-part identical, there is no need for us to further consider the relatedness of Applicant’s goods with the other goods identified in the cited

registration. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

The third *DuPont* factor concerns “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567). Because the goods described in the application and the cited registration are in-part identical, we must presume that the channels of trade and classes of purchasers for those goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *see also Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade”); *In re Smith & Mehoffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers”).

The remaining goods, being unrestricted, are presumed to travel through all normal and usual trade channels for such goods, and that they are sold to all classes of prospective purchasers for those goods. *Stone Lion, Capital v. Lion Capital*, 110 USPQ2d at 1161; *see also Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (absent limitation, “goods are presumed to travel in all normal channels ... for the relevant goods.”).

We find that the identity in part of the goods, and their presumed overlapping channels of trade and consumers weigh heavily in favor of likelihood of confusion.

B. Strength of the Cited Mark / Number and Nature of Similar Marks

Next, we evaluate the strength of the registered mark and the scope of protection to which it is entitled. The fifth *DuPont* factor is the strength of the prior mark, and the sixth factor is the number and nature of similar marks in use for similar goods or services. *DuPont*, 177 USPQ at 567. In determining strength of a mark, we consider both inherent strength, based on the nature of the mark itself, and commercial strength or recognition. *In re Chippendales USA Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”).

We are not persuaded by Applicant’s argument that:

All trademarks are not equal. Some are strong, some are weak and most are somewhere in between. “Strong” marks are given “strong” protection—protection over a wide range of related products and services and variations on visual and aural format. The stronger the mark, the more likely it is that encroachment on it will produce confusion. Conversely, relatively weak marks are given a relatively narrow range of protection both as to products and format variations. (Internal citations omitted.) Likewise, here, there is no evidence that the

cited Prior Mark is famous or has acquired secondary meaning within the marketplace or that consumers associate the terms EFF or E-F-F with the Prior Owner.³

Applicant's arguments misapprehend the legal underpinnings of the fifth and sixth *DuPont* factors. Turning first to inherent strength, there is no evidence of record



that the term comprising the mark possesses any but an arbitrary meaning in connection with the goods identified thereby. Such marks are inherently or conceptually strong. *See Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 71 USPQ2d 1173 (Fed. Cir. 2004) (defining an arbitrary mark as a “known word used in an unexpected or uncommon way” and observing that such marks are typically strong); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (arbitrary terms are conceptually strong trademarks).

There is no evidence of third-party use; and there is no evidence of third-party registration of similar marks for related products or services. *Cf. Juice Generation, Inc. v. GS Enters LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1135-36 (Fed. Cir. 2015).

Further, the cited registration issued on the Principal Register without a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. §1052(f), and

³ 6 TTABVue 10 (Applicant's brief).

we must accord the cited registration the presumption of validity provided for under Section 7(b) of the Trademark Act, 15 U.S.C. §1057(b). We thus presume that the



mark is inherently distinctive with no need to acquire secondary meaning.

There is also no evidence regarding the mark's commercial or marketplace strength. In an *ex parte* appeal, the owner of the cited registration is not a party, and the Examining Attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). For that reason, "in an *ex parte* analysis of the *du Pont* factors for determining likelihood of confusion ..., the '[commercial strength] of the mark' ... is normally treated as neutral when no evidence as to [marketplace recognition] ... has been provided." TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1207.01(d)(ix) (Jun. 2021). Because there is no evidence of record regarding the commercial strength of the cited mark, this consideration is neutral.

Based upon the totality of the record evidence, we find that the registered mark is arbitrary and distinctive as applied to the identified goods and is entitled to the normal scope of protection to which inherently distinctive marks are entitled. *See Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (stating that likelihood of confusion fame varies along a spectrum from very strong to very weak).

The fifth and sixth *DuPont* factors are neutral.

C. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of



Applicant's EFF APPAREL mark and the registered mark in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1160; *Palm Bay Imps.*, 73 USPQ2d at 1692. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); accord *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted). *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018).

"The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs. Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721 (internal quotation marks omitted). See also *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988).

We find that the dominant feature of Applicant's EFF APPAREL mark is the term "EFF." Because this term appears first in the applied-for mark, it is most likely to be impressed in purchasers' memories. *Presto Products, Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered").

Applicant's mark also includes the following term "APPAREL," describing "clothing, especially outer garments; attire."⁴ For source-identifying purposes, consumers will likely focus on the "EFF" element in the mark in view of the fact that the additional literal portion, namely "APPAREL" is at best merely descriptive of the recited goods. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (quoting *In re Nat'l Data*, 224 USPQ 749, 752 (Fed. Cir. 1985) ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion"); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression").

The wording "EFF" in the registered mark similarly has more source-identifying significance than the baseball and home plate design. It is settled that where, as here, a mark comprises both words and a design, the words are normally accorded greater

⁴ April 14, 2020 first Office Action at 8. Definition retrieved on April 14, 2020 from AHDictionary.com, an electronic version of The American Heritage Dictionary of the English Language, Fifth Ed (2020).

weight, in part because consumers are likely to remember and use the word(s) to request the identified goods or services. *In re Viterro Inc.*, 101 USPQ2d at 1911 (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”).

Applicant’s EFF APPAREL mark adopts the wording of the registered mark



in its entirety, adding the descriptive or generic wording “APPAREL.” The marks are similar in appearance and sound to the extent that both include “EFF” as the most prominent portion thereof. Consumers encountering the marks aurally may consider the registered mark a shortened version of the applied-for mark, *See In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) (“the users of language have a universal habit of shortening full names—from haste or laziness or just economy of words”)).

Applicant argues:

Here, Applicant’s word mark is for EFF APPAREL, whereas the Prior Mark is for E F F. Specifically, the Application is for the *coined word*

EFF (a purposeful misspelling of the letter F), whereas the Prior Mark is for the *letters*, E, F, and F.⁵

The Prior Mark is properly pronounced as “E-F-F,” because the Prior Mark is not for EFF, but for the acronym E-F-F. Accordingly, each letter **must** be individually read. Furthermore, the Application [sic] is pronounced simply as “F” (i.e., *eff*).⁶

To support his argument about pronunciation, Applicant relies upon a statement in the ABOUT section of his company’s website that states “We don’t give an Eff and we hope you don’t too. ... Let’s Eff everybody – together.”⁷ However, Applicant’s arguments regarding the manner in which consumers will view and vocalize the marks are unsupported by sworn statements or other evidence of *consumer perception*, and ‘attorney argument is no substitute for evidence.’” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, *14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367 , 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)). For example, there is no evidence regarding the extent to which consumers will be exposed to the statement in the ABOUT section of his website or whether the sentiments expressed therein influence consumers to purchase Applicant’s clothing items. And there is no evidence to support his contentions regarding how consumers will pronounce the registered mark.

We acknowledge that there is no rule for gauging how consumers will pronounce a mark; that is, there is no correct pronunciation of a trademark that is not a recognized

⁵ 6 TTABVUE 5 (Emphasis supplied by Applicant).

⁶ 6 TTABVUE 5-6 (Emphasis supplied by Applicant).

⁷ October 14, 2020 Response to first Office Action at 17; December 30, 2020 Request for Reconsideration at 16.

word. See *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1409 (TTAB 2010). However, absent evidence to the contrary, we must consider all reasonable possibilities, including that the wording would be pronounced the same in the respective marks. See *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014) (“Where a trademark is not a recognized word and the weight of the evidence suggests that potential consumers would pronounce the mark in a particular way, it is error for the Board to ignore this evidence entirely and supply its own pronunciation.”).

Applicant also argues:

Furthermore, the Applicant’s use of the phrase EFF is in reference to the vulgar slang work [sic] “fuck” (e.g., “F” that, “F” off, etc.) Such an impression is entirely absent from the Prior Mark. See, e.g., Exhibit A in Applicant’s Request for Reconsideration wherein Applicant states “Let’s eff everybody – together.” The Prior Mark’s use of E-F-F is as an acronym, and protection is sought for the letters E-F-F wherein each letter stands for EBBETS FIELD FLANNELS respectively.⁸

Again, there is no evidence of the extent to which consumers will be influenced by Applicant’s intended meaning of his mark when purchasing his goods. Similarly, there is no evidence that consumers will be aware of the asserted acronym significance of the registered mark.

We acknowledge that the presence of “APPAREL” as the leading term in Applicant’s mark differentiates it visually and aurally from the registered mark. We further recognize that the baseball and home plate design in the registered mark differentiates it from the applied-for mark. These points of distinction, however, do

⁸ 6 TTABVUE 6.

not significantly diminish the strong similarities in connotation and overall commercial impression engendered by these two marks. Based upon the above analysis, we find that EFF APPAREL is more similar than dissimilar to the mark



in terms of appearance, sound, connotation, and commercial impression.



As a result, consumers encountering EFF APPAREL and could mistakenly believe the former is a variation on the registered mark used to identify a particular line of clothing as a subset of Registrant's goods, but nonetheless emanating from a common source. *See In re Bay State Brewing Co.*, 117 USPQ2d at 1961 (citing *In re Abcor Dev. Corp.*, 200 USPQ at 219).

This is especially the case here because, “[w]hen marks would appear on virtually identical ... [goods or] services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *See Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d 1698, 1799, (Fed. Cir. 1992). *See also ECI Division of E-Systems, Inc. v. Environmental Commc'ns. Inc.*, 207 USPQ 443, 449 (TTAB 1980).

For these reasons, we find that the marks are more similar than dissimilar. The first *DuPont* factor thus also weighs in favor of finding a likelihood of confusion.

D. Conditions of Sale

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567.

Applicant argues, without evidentiary support, that “[t]he Prior Owner and Applicant deal in respective goods and services that can be extremely expensive. If the goods or services are relatively expensive, more care is taken and buyers are less likely to be confused as to source or affiliation.”⁹

However, the goods identified in the application and cited registration are not restricted by trade channel or price point and will be available to all interested purchasers. While some purchasers may be discriminating and exercise care in their selection, others may not exercise as great a degree of care. The goods at issue include ordinary items of casual and athletic clothing offered to all types of consumers, including ordinary consumers exercising an ordinary degree of care.¹⁰ Nothing about the identified goods suggests that the consumers are particularly sophisticated or that the conditions of sale would mitigate any confusion that would otherwise be likely. The standard of care is that of the least sophisticated potential purchaser. *Stone Lion Capital v. Lion Capital*, 110 USPQ2d at 1163 (*cited in In re FCA US LLC*,

⁹ 6 TTABVue 10.

¹⁰ Evidence of record suggests that certain of Applicant’s goods are priced between \$16 and \$30. February 11, 2021 Denial of Request for Reconsideration at 4-7.

126 USPQ2d at 1222 (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”)).

In the absence of any evidence relating to the degree of care purchasers exercise with regard to clothing such as T-shirts, hats, hoodies and other items of casual clothing, the similarity of the marks and identity in part of the goods outweigh Applicant’s assertion that purchasers are sophisticated or careful in their purchases. *See HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff’d*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decisions, and expensive goods).

Moreover, were we to accord a level of sophistication to the purchasers of the services at issue, even sophisticated purchasers are not immune from source confusion. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”)).

E. Actual Confusion

Finally, Applicant argues that there is no evidence of any actual confusion and that there has been concurrent use since January 2019. We do not accord any weight to Applicant’s contention, unsupported by any evidence, that there have been no instances of actual confusion despite contemporaneous use of the respective marks.

The Federal Circuit has addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an ex parte proceeding:

With regard to the seventh *DuPont* factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

In re Majestic Distilling Co., 65 USPQ2d 1291, 1205 (Fed. Cir. 2003).

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not compelling in support of a finding of no likelihood of confusion, particularly in an ex parte proceeding in which the owner of the cited registration cannot appear. Thus, we cannot conclude from the purported lack of instances of actual confusion that confusion is not likely to occur.

The seventh *DuPont* factor is neutral.

F. Conclusion

When we consider the record and the relevant likelihood of confusion factors, and all of Applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that consumers familiar with registrant's

clothing items offered under its mark



would be likely to believe, upon

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encountering Applicant's EFF APPAREL mark, that the in-part identical goods originated with or are associated with or sponsored by the same entity.

Decision: The refusal to register Applicant's mark is affirmed under Section 2(d) of the Trademark Act.